

Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(NCC)-1132 OF 2011
ZAINUN ALI, RAMLY ALI AND ZAHARAH IBRAHIM JJCA
12 JULY 2011

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Contract — Building contract — Retention monies — Appellant went into liquidation before releasing retention monies to respondents — Whether retention monies were held on trust by appellant in favour of respondents — Whether respondents' claim should fail because contract did not contain specific trust clause — Whether retention monies were by nature and purpose trust monies — Whether failure to separate retention monies into separate account

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The appellant and the respondents entered into a building contract ('the contract'). Under the contract, the first and second respondents were appointed as contractor and subcontractor respectively of their part of the works. The contract provided that the appellant was entitled to deduct and retain a certain sum of monies ('the retention monies') from the interim payments or progress payments due and payable to the respondents. The retention monies, which were monies held over by the appellant to be used by it to rectify the defects in the respondents' works during the defect liability period, were to be released to the respondents in two halves; with the first half to be released upon the issuance of the handing over certificate and the second half released upon the issuance of the maintenance certificate or certificate of statutory completion. The appellant was voluntarily wound up. However, prior to its liquidation it had not released to the respondents the retention monies amounting to RM6,127,884.50 under the contract. The respondents filed an action against the appellant for a declaration that the retention monies held by the appellant was held on trust by the appellant in favour of the respondents. The appellant opposed the respondents' claim on the grounds that there was no express provision in the contract stipulating that the retention monies were trust monies; that the retention monies had not been set aside in a separate account as trust monies; that the first respondent had filed a proof of debt in respect of the retention monies and were thus estopped from claiming the retention monies to be trust monies. The trial judge found that it was implied that the monies were held by the appellant on trust for the respondents and that the respondents were not estopped from asserting that the retention monies were trust monies even though they had submitted the proof of debt in relation to the retention monies. Accordingly the High Court allowed the respondents' claim with costs fixed at RM25,000. This was the appellant's appeal against that decision. The appellant submitted that the fact that the

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A retention monies were not separated into a separate account prior to its liquidation had changed the status of the retention monies as trust monies.

Held, dismissing the appeal with costs:

- B (1) The retention monies were already earned by the respondents for the works already done under the contract, and thus the court could not reject the respondents' claim just because the parties did not choose to enter into an agreement with a specific trust clause (see paras 16 & 17).
- C (2) The usage of the word 'deduction' in cl 22 of the contract supported the fact that the parties recognised that the retention monies were the respondents' or contractors' monies. All the requisites of a valid trust were present and the parties had manifested a clear intention to create a trust from the outset. As such, the retention monies held by the appellant (employer) did not belong to it. The High Court judge was right in law and in fact in holding that the retention monies by their very nature and purpose were trust monies, held by the appellant as trustee for the respondents (see paras 18 & 19).
- D (3) There was no requirement that the retention monies had to be kept in a separate bank account. Once it was established that the retention monies were in fact trust monies, it did not matter that the monies were not set aside prior to the appellant company's liquidation. Even if the monies may have been mixed in the appellant's common fund, they could still be determined and traceable. The retention monies neither formed part of the general assets of the appellant nor belonged to the appellant. As such, the setting aside of the retention monies when the appellant was under liquidation did not amount to a preferential payment under s 223 of the Companies Act 1965 (see paras 20–23, 29 & 30).
- E (4) The appellant's argument that the respondents' were estopped from claiming the retention monies to be trust monies after filing the proof of debt was an afterthought raised after the defence was filed. In any case, it was clear from the sequence of events in the present case that the first respondent had always maintained its stand that the retention monies were trust monies. Thus the issue of estoppel raised by the appellant had no merit (see paras 31–35).
- F (5) The respondents were entitled to their claim for a declaration that the retention monies totaling RM6,127,884.50 were held in trust by the appellant for the respondents and for the release of the same by the appellant to the respondents (see para 36).
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[Bahasa Malaysia summary]

Perayu dan responden-respondeen memasuki satu kontrak pembinaan ('kontrak tersebut'). Di bawah kontrak tersebut, responden pertama dan kedua

dilantik sebagai kontraktor dan subkontraktor bagi bahagian kerja masing-masing. Kontrak tersebut memperuntukkan bahawa perayu berhak untuk menolak dan menahan sejumlah wang ('wang tahanan') untuk bayaran sementara atau bayaran kemajuan yang tertunggak dan perlu dibayar kepada responden-responden. Wang tahanan tersebut, yang dipegang oleh perayu untuk digunakannya untuk membetulkan kecacatan dalam kerja-kerja responden-responden semasa tempoh liabiliti kecacatan, akan dilepaskan kepada responden-responden dalam dua bahagian; dengan bahagian pertama akan dilepaskan selepas pengeluaran sijil penyerahan dan bahagian kedua dilepaskan selepas pengeluaran sijil penyenggaraan dan sijil penyelesaian statutori. Perayu telah digulungkan secara sukarela. Walau bagaimanapun, sebelum pembubarannya, ia tidak melepaskan kepada responden-responden wang tahanan berjumlah RM6,127,884.50 di bawah kontrak tersebut. Responden-responden memfailkan tindakan terhadap perayu untuk deklarasi bahawa wang tahanan yang dipegang oleh perayu dipegang atas amanah oleh perayu bagi pihak responden-responden. Perayu membantah tuntutan responden-responden atas alasan bahawa tidak ada peruntukan secara langsung di dalam kontrak tersebut yang menyatakan bahawa wang tahanan tersebut adalah wang amanah; bahawa wang tahanan tidak diketepikan dalam akaun berasingan sebagai wang amanah; bahawa responden pertama telah memfailkan bukti hutang berkaitan dengan wang tahanan dan dengan itu diestop daripada menuntut wang tahanan sebagai wang amanah. Hakim bicara mendapati bahawa adalah tersirat bahawa wang tersebut dipegang oleh perayu atas amanah bagi responden-responden dan bahawa responden-responden tidak diestop daripada menyatakan bahawa wang tahanan tersebut adalah wang amanah walaupun mereka telah mengemukakan bukti hutang berkaitan dengan wang tahanan tersebut. Dengan itu, Mahkamah Tinggi membenarkan tuntutan responden-responden dengan kos ditetapkan sebanyak RM25,000. Ini adalah rayuan perayu terhadap keputusan itu. Perayu menghujahkan bahawa fakta bahawa wang yang ditahan tidak diasingkan ke dalam akaun yang berasingan sebelum pembubarannya telah mengubah status wang tahanan sebagai wang amanah.

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Diputuskan, menolak rayuan dengan kos:

- (1) Wang tahanan telah pun diperoleh oleh responden-responden bagi kerja-kerja yang telah dijalankan di bawah kontrak tersebut, dan dengan itu mahkamah tidak boleh menolak tuntutan responden-responden hanya kerana pihak-pihak tidak memilih untuk memasuki perjanjian dengan klausa amanah spesifik (lihat perenggan 16 & 17).
- (2) Penggunaan perkataan 'deduction' dalam klausa 22 kontrak tersebut menyokong fakta bahawa kesemua pihak mengakui bahawa wang tahanan adalah wang responden-responden atau kontraktor-kontraktor. Kesemua keperluan amanah yang sah wujud dan pihak-pihak telah menunjukkan niat yang jelas untuk membentuk amanah dari awal lagi.

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- A Oleh demikian, wang tahanan yang dipegang oleh perayu (majikan) bukan miliknya. Hakim Mahkamah Tinggi adalah betul dari segi fakta dan undang-undang dalam memutuskan bahawa wang tahanan tersebut dari segi sifat dan tujuannya adalah wang amanah, yang dipegang oleh perayu sebagai pemegang amanah untuk responden-responden (lihat perenggan 18 & 19).
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- C (3) Tidak ada keperluan bahawa wang tahanan perlu disimpan di dalam akaun bank yang berasingan. Sebaik sahaja dibuktikan bahawa wang tahanan adalah sebenarnya wang amanah, ia tidak menjadi hal bahawa wang tersebut tidak diketepikan sebelum pembubaran syarikat perayu. Walaupun wang tersebut mungkin tercampur di dalam dana bersama perayu, ia masih boleh ditentukan dan boleh dikesan. Wang tahanan tersebut tidak membentuk sebahagian aset umum perayu dan bukan milik perayu. Dengan itu, pengenehan wang tahanan apabila perayu dibubarkan tidak bermaksud pembayaran utama di bawah s 223 Akta Syarikat 1965 (lihat perenggan 20-23, 29 & 30).
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- E (4) Hujahan perayu bahawa responden-responden diestop daripada menuntut wang tahanan sebagai wang amanah selepas memfailkan bukti hutang adalah suatu fikiran semula yang dibangkitkan selepas pembelaan difailkan. Walau bagaimanapun, adalah jelas daripada kronologi peristiwa di dalam kes ini bahawa responden pertama telah sentiasa mengekalkan pendiriannya bahawa wang tahanan adalah wang amanah. Dengan itu, isu estoppel yang dibangkitkan oleh perayu tidak bermerit (lihat perenggan 31-35).
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- G (5) Responden-responden berhak terhadap tuntutan mereka untuk deklarasi bahawa wang tahanan berjumlah RM6,127,884.50 adalah dipegang secara amanah oleh perayu untuk responden-responden dan untuk ia dilepaskan oleh perayu kepada responden-responden (lihat perenggan 36).]

Notes

For cases on building contract in, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3264-3499.

H**Cases referred to**

ABB Transmission & Distributions Sdn Bhd v Sri Antan Sdn Bhd & Anor [2009] 7 MLJ 644; [2008] 10 CLJ 1, HC (refd)

FR Absalom Ltd v Great Western Garden Village Society [1933] AC 592 (refd)

I *Geh Cheng Hooi & Ors v Equipment Dynamics Sdn Bhd and other appeals* [1991] 1 MLJ 293, SC (refd)

Kayford Ltd, Re [1975] 1 All ER 604 Ch D (refd)

Kumpulan Liziz Sdn Bhd v Pembinaan OCK Sdn Bhd [2003] 4 CLJ 709, HC (refd)

Lee Kam Chun v Syarikat Kukuh Maju Sdn Bhd (Syarikat Perumahan Pegawai Kerajaan Sdn Bhd, garnishee) [1988] 1 MLJ 444 (folld) A

Merino ODD Sdn Bhd v PECD Construction Sdn Bhd [2009] MLJU 671, HC (refd)

Rayack Construction Ltd v Lampeter Meat Co Ltd (1979) 12 BLR 34 (not folld) B
Syarikat Pembinaan Woh Heng Sdn Bhd v Meda Property Services Sdn Bhd (S6-24-1169 of 2001) (unreported) (refd)

Legislation referred to

Companies Act 1965 s 223, Form 77 C

Sean Yeow (Lee Hishammuddin, Allen & Gledhill) for the appellant.

Leong Wai Hong (Lam Wai Loon and Tan Lai Yee with him) (Skrine) for the respondents.

Ramly Ali JCA (delivering judgment of the court):

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THE APPEAL

[1] The present appeal before this court is against the decision of the learned High Court judge dated 22 April 2011 in allowing the respondents' application for a declaration that the retention sum held by the appellant under the relevant contract is held on trust by the appellant in favour of the respondents and granting injunctive reliefs as prayed with costs of RM25,000. The appellant was the defendant and the respondents were the plaintiff's at the court below. E F

FACTUAL BACKGROUND

[2] The parties have agreed to the following facts which are stated in the statement of agreed facts: G

- (a) the respondents and the appellant company entered into a contract dated 22 August 2007 for a project known as the 'Design and Build for Qimonda Global Module House Project at Senai, Johor' ('the Contract'); H
- (b) the first respondent was the design and build contractor of the said project to design, construct and maintain the Global Module House at Lot 1, Airport Logistic Park, Sultan Ismail International Airport, 81259 Johor ('the works'). The first respondent was the contractor for their part of the works ('CSA package') under the contract while the second respondent was the nominated subcontractor for their part of the works ('MEP package') under the contract; I
- (c) under cl 22.1.3 of the contract, the retention monies were to be deducted

- A** for value of work already and actually done and materials supplied as certified in the payment certificates;
- (d) pursuant to cl 23.1 of the contract, the appellant company shall release one half of the retention monies to the respondent upon the issuance of the handing over certificate. Clause 23.2 of the contract further states that the appellant company shall release the second half of the retention sum monies to the respondents upon the issuance of the maintenance certificate or after the issuance of the certificate of statutory completion for the works by the relevant authority, whichever is the later;
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- C** (e) to date, the retention monies of RM6,127,884.50 has not been paid by appellant company to the respondents;
- (f) the Global Module House was handed over to the defendant company on 30 June 2008. A certificate of practical completion was also issued by the architect on 17 July 2008. To date, the respondents have not obtained the certificate of statutory completion;
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- (g) the appellant company's records contain a copy of a letter from Advanced Engineering (Asia) Pte Ltd dated 10 February 2009 recommending the full release of the retention monies for MEP package and first half retention monies for CSA package in the sum of RM4,515,192.25;
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- (h) on 9 April 2009, the directors of the appellant company passed a board resolution and declared that the appellant company could not, by reason of its liabilities, continue its business. They decided to voluntarily wind up the appellant company. A provisional liquidator, Dato Gan Ah Tee was appointed over the appellant company;
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- (i) a meeting of the members and the creditors of the appellant company was held on 23 April 2009 and Dato Gan Ah Tee and Mok Chew Yin were jointly and severally appointed as the liquidators of the appellant company;
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- (j) the respondents have submitted their proof of debt in Form 77 to the appellant company on 14 September 2009;
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- (k) the defect liability period under the contract had expired on 30 June 2010; and
- (l) prior to the liquidation of the appellant company, the respondents had never requested the appellant company to appropriate and set aside the retention sum into a separate trust fund account.
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- [3] The parties also have agreed on the following issues to be tried:
- (a) whether the retention monies which had not been paid by the appellant

company to the respondent under the contract amounting to RM6,127,884.50 are trust monies held by the appellant company in favour of respondents;

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- (b) whether the respondents are estopped from asserting that the retention monies are in fact trust monies due to their action of submitting the proof of debt via Form 77 of the Companies Act 1965 in relation to the said monies; and

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- (c) in the event this court finds that the said monies are trust monies held by the appellant company in favour of the respondents, whether the respondents at this stage of the liquidation process of the appellant company are entitled to be granted the reliefs prayed for by the respondents in the writ of summons filed herein.

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[4] The relevant provisions in the contract for the purpose of the present case are cl 22 (on progress payments) and cl 23 (on the release of the retention monies).

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[5] Clause 22.1 provides that the respondents as contractor were to submit an application for payment for progress payment to the appellant's representative supported by relevant documents which shall include the detailed monthly progress report and shall contain information on the value of the design in accordance with the schedule of fees as shown in the contract documents; the value of works executed (including variations) and materials and the amount to be deducted as retention monies. Clause 22.2 provides that within 21 days of the receipt of the application for progress payment the appellant's representative shall issue an interim payment certificate. Clause 22.4 of the contract provides that the appellant (as employer) shall pay the amount certified as due to the respondents (as contractor) in the interim payment certificate within the time period set out in appendix 1 of the contract agreement from the date of receipt of such interim payment certificate subject to the employer's rights to deduct any sum or damages against the contractor under the contract. With regard to the deduction that the employer can make from the sum certified in the interim payment certificate, it includes the deduction for the retention monies as provided under cl 22.1.3 of the contract.

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[6] Clause 22.1.3 of the contract provides:

an amount to be deducted as retention sum, calculated by reference to the percentage of retention as set out in Appendix 1 in relation to the total of the amounts under clauses 22.1.1 and 22.1.2 above, until the total amount so retained is equal to the limit of the retention as stated in Appendix 1. In this case the total amount of sum retained pursuant to the above clause is RM6,127,884.50.

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- A** [7] Clause 23 of the contract deals with the release of the retention monies. Clause 23.1 provides that after the issue of the handing over certificate the employer shall release one half of the retention monies to the contractor subject to the employer's right to withhold such amount as may be appropriate to reflect the minor outstanding works still uncompleted at the time of the issue of the handing over certificate. But the employer shall not be required to release the first half of the retention monies unless the contractor has submitted all the relevant drawings required to be submitted under the contract. Clause 23.2 of the contract provides that after the issue of the maintenance certificate or after the issue of the certificate of statutory completion for the works by the relevant authority whichever is the later, the employer shall release the second half of the retention monies to the contractor less any costs of completing any minor outstanding works or costs of rectification of defects or loss of value of works.
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THE APPELLANT'S CONTENTIONS

- D** [8] The appellant's opposed the respondents' claim and had taken the stand that the appellant is not obliged to release the retention monies upon its liquidation for the following reasons:
- E** (a) there is no express provision in the contract stipulating that the retention monies are trust monies;
- (b) the retention monies were not aside in a separate account as trust monies prior to the appellant's liquidation;
- F** (c) the respondents did not request for the retention monies to be set aside in a separate account prior to the appellant's liquidation;
- (d) after the appellant had gone into liquidation, the first respondent's representative ('PW1') attended creditors meeting and was nominated to the committee of inspection; and
- G** (e) the first respondent had filed a proof of debt in respect of the retention monies.

THE RESPONDENTS' CONTENTIONS

- H** [9] The respondents on the other hand, contended that:
- (a) the retention monies are, by their nature and purpose, trust monies;
- I** (b) the presence of an express trust clause in the contract is not a precondition to the creation of a trust; trust can be created by operation of law;
- (c) the retention monies held by the appellant as trustee for the respondents must be held in its capacity as a fiduciary to the trust;

- (d) there is no issue of preferential treatment if the retention monies are found to be trust monies because the retention monies do not belong to the appellant in the first place; A
- (e) the fact that the retention monies were not separated from the common funds of the appellant prior to its liquidation, did not change the fact that the retention monies are trust monies; B
- (f) the appellant's contention that the respondents are estopped from claiming that the retention monies are trust monies when the respondents filed the proof of debt vide Form 77 dated 11 September 2009, is an afterthought and non-issue; such contention was only raised after the defence was filed; C
- (g) the filing of the proof of debt by the respondents was done without prejudice to the respondents' right to claim for the retention monies as trust monies; and D
- (h) therefore the respondents are entitled to their claim herein.

FINDINGS OF THE HIGH COURT

[10] In allowing the respondents' claim the learned High Court judge made, *inter alia*, the following findings: E

- (a) that the retention monies held by the appellant under the contract belong to the respondents and it is implied that the monies are held by the appellant on trust for the respondents and payable to the respondents if the appellant (as employer) does not make any claim on the monies in accordance with the terms of the contract; F
- (b) that the respondents are not estopped from asserting that the retention monies are trust monies although they had submitted the proof of debt in relation to the sums; this is because the respondents' representative (PW1) who attended the first creditors' meeting of the appellant (after its liquidation) had asserted that the retention monies are trust monies; and G
- (c) in view of the above findings, the respondents are entitled to be granted the reliefs prayed for in the writ of summons. Accordingly, the respondents' claim was allowed with costs fixed at RM25,000. H

FINDINGS OF THIS COURT

[11] Clause 22 of the contract provides for the deduction or payment to be made for the retention monies; and cl 23 provides for the release of the retention monies. It is a common feature found in many construction contracts where a percentage of the amount certified in interim payments is to be deducted by the employer as retention monies. These monies are held over by I

A the employer until all defects have been satisfactorily rectified by the contractor. In the event that the contractor fails to rectify the defects properly, this amount can be used towards the disbursement of expenses incurred by the employer in rectifying the defects. The remaining portion of the monies is usually released on the expiry of the defects liability or maintenance period. (see B *Law and Practice of Construction Contracts* by Chow Kok Fong, (3rd Ed), at p 344).

[12] There are a number of authorities to suggest that until such time when the retention monies are actually disbursed to the employer for the rectification of defects, the property in the monies, even while they are being held by the employer, reside with the contractor. On the terms of the relevant contract, while the employer may have recourse to the retention monies to meet claims against the contractor under the contract, the beneficial interest of the contractor in the retention monies remains. The employer's interest in the retention monies is 'fiduciary' in nature, in the sense that the employer is the trustee for the contractor in respect of the monies in question, (see *FR Absalom Ltd v Great Western Garden Village Society* [1933] AC 592; and *Lee Kam Chun v Syarikat Kukuh Maju Sdn Bhd* (*Syarikat Perumahan Pegawai Kerajaan Sdn Bhd, garnishee*) [1988] 1 MLJ 444).

[13] In the present case the first question which arises for determination is whether a trust can be implied where the agreement or contract does not contain an explicit provision that the retention monies be held on trust by the employer.

[14] In *Re Kayford Ltd* [1975] 1 All ER 604, Megarry J had pointed out that it is well settled that a trust can be created without using the word 'trust' or 'confidence' or the like: the question is whether in substance a sufficient intention to create a trust has been manifested.

[15] The Supreme Court (comprised of Harun Hashim SCJ, Mohamed Yusof SCJ and Gunn Chit Tuan SCJ) in the case of *Geh Cheng Hooi & Ors v Equipment Dynamics Sdn Bhd and other appeals* [1991] 1 MLJ 293 had expressed the following:

Although we would agree with the view that a trust should not normally be imported into a commercial relationship, yet we would hold that in cases such as those involved in these appeals the court could and should consider the facts to determine whether a fiduciary relationship existed.

[16] The court must consider the circumstances concerning the relationship between the parties. A trust (as in the case of *Geh Cheng Hooi* as well as in the present case) can be implied even where the agreements themselves do not

contain an express clause as it is clearly manifested in the agreements and the correspondence concerned that it was the intention of the parties to create one. The court must look into the arrangements as to how the monies were deducted from the progress payments under the contract, held and treated by the parties. The court cannot reject the respondent's claim just because they did not choose to enter into an agreement with specific trust clause.

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[17] The retention monies are monies already earned by the respondents (as contractor) for the works already done under the contract. These monies are part of the progress payments claimed and certified for payment to the respondents (as contractor) under cl 22 of the contract concerned. Under cl 22.1.3 of the said contract, the retentions monies are 'calculated by reference to the percentage of retention as set out in Appendix 1 in relation to the total amounts under Clauses 22.1.1 and 22.1.2 above, until the total amount so retained is equal to the limit of the retention as stated in Appendix 1'.

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[18] The purpose of the deduction is to make provision for making good the defects only. If they are not applied for that purpose, it was understood that they would be returned to the contractor after the expiry of the defect liability period. The usage of the word 'deduction' for the creation of the retention monies from the certified sum under cl 22 of the contract further support the fact that the parties recognised that the retention monies are contractor's monies. All the requisites of a valid trust were present and the parties had manifested a clear intention to create a trust since from the outset, the whole purpose of what had been done had been to ensure that the monies remained in the beneficial ownership of the respondents; and a trust is the obvious means of achieving this. As such the retention monies held by the appellant (employer) do not belong to the appellant (employer).

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[19] The learned High Court judge was right in law and in fact in holding that the retention monies by their very nature and purpose, are trust monies, held by the appellant as trustee for the respondents. The respondents are the beneficial owner of the said monies. The monies are held back by the appellant (as employer) only for a specific purpose, and not on the basis whether there was an express provision for trust. In the circumstances, the retention monies held by the appellant must be held in its capacity as a fiduciary to the trust for the respondents, (see *ABB Transmission & Distributions Sdn Bhd v Sri Antan Sdn Bhd & Anor* [2009] 7 MLJ 644; [2008] 10 CLJ 1 (CA) and *Kumpulan Liziz Sdn Bhd v Pembinaan OCK Sdn Bhd* [2003] 4 CLJ 709).

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[20] The appellant contended that the respondents are not entitled for an order to set aside or release of the retention monies, since no part of the retention monies had been set aside prior to the liquidation of the appellant. With respect the court cannot agree with the appellant on this point. The court

- A is of the considered view that, once it is established that the retention monies are, in fact, trust monies, it matters not whether the monies were set aside prior to liquidation. The monies may have been mixed in the common fund of the appellant; but they can still be determined and traceable. On this issue, the court is in full agreement with the Supreme Court in the case of *Gen Cheng Hooi* where it was held:

- C The learned judge also held that money for the goods paid by a customer became trust money to be held in trust by the licensor. The money was also intended to be banked in a common fund and this did not have the effect of the money losing its character of being trust money. As such, it is traceable.

- D [21] There is no requirement that the retention monies held by the appellant must be kept in a separate bank account. It does not change the status of the said monies as trust monies held for the specific purpose. There is also no requirement that the respondents (as contractor) must request for the monies to be kept in a separate bank account. This point was made clear by Megarry J in *Re Kayford Ltd*, where he said:

- E Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements.

- F [22] Thus, the retention monies cannot form part of the general assets of the appellant. In an appropriate case, the court can still order for the preservation or release of the retention monies even after winding up proceedings have been presented against the appellant or the appellant is in the process of liquidation. The failure to separate the retention monies from the common funds of the appellant prior to the appellant's liquidation did not, and cannot defeat the trust (see *Re Kayford Ltd*; *Syarikat Pembinaan Woh Heng Sdn Bhd v Meda Property Services Sdn Bhd* (S6-24-1169 of 2001) (unreported) and *Merino ODD Sdn Bhd v PECD Construction Sdn Bhd* [2009] MLJU 671).

- H [23] The setting aside, release or preservation of the retention monies where the appellant is under liquidation does not amount to a preferential payment under s 223 of the Companies Act 1965 for the simple reason that the said monies are trust monies and do not belong to the appellant in the first place.

- I [24] On this issue, the court is in agreement with Azmel Maamor J in *Syarikat Pembinaan Woh Heng Sdn Bhd* where he said:

Secondly, on the defendant's argument that since there is currently winding up proceedings against the defendant this action taken by the plaintiff for the preservation of the retention monies would tantamount to a preferential payment

and as such would be prohibited by s 223 of the Companies Act 1965. In respect of this argument I fully agree with the submission of the counsel for the plaintiff in that s 223 of the Companies Act 1965 is inapplicable because the retention monies do not belong to the defendant at all. The retention monies are held on trust in a fiduciary capacity by the defendant as the employer for the benefit of the plaintiff who was the contractor. Hence this argument by the defendant had no merits whatsoever.

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[25] The appellant, relied on the English case of *Rayack Construction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 34, to support its contention that whether or not a trust was created of the retention monies is predicated upon whether or not the retention monies were set aside prior to liquidation. In that case (*Rayack Construction Ltd*) the court held that the express trust provision in the contract, without having set aside the funds in a separate account, is insufficient to safeguard the contractor's beneficial interest in the funds in the event the employer goes into liquidation.

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[26] The above decision in *Rayack Construction Ltd* was not followed by the Malaysian court. The Malaysian Supreme Court in *Geh Cheng Hooi* affirmed the decision of the High Court where it was held that 'money for the goods paid by a customer became trust money to be held in trust by the licensor; the money was also intended to be bank in a common fund and this did not have the effect of the money losing its character of being trust money, and as such, it is traceable'. This decision is a clear indication that the Malaysian apex court recognised the principle as decided in *Re Kayford Ltd* that payment into a separate bank account, is by no means conclusive indication of an intention to create a trust; and there is nothing to prevent the parties from binding themselves by a trust even if there are no effective banking arrangements. (The above decision was also followed in *Syarikat Pembinaan Woh Heng Sdn Bhd* and *Merino ODD Sdn Bhd*).

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[27] The position in *Rayack* case also does not sit well with the case in, where the chancery court decided that the monies obtained by defendant company for goods not yet delivered to its customers were held in trust by the defendant company in favour of the customers, even after the liquidation of the defendant company; and the setting up of a separate fund was not a necessary condition for the creation of a trust. The decision in *Re Kayford Ltd* has been followed by the Malaysian courts.

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[28] The English Court in the *Rayack Construction* case has imposed an extremely high obligation upon the contractors to safeguard the retention funds during the performance of the contract, and more often than not, the proposition does not reflect the commercial reality of the construction industry, particularly in the Malaysian context. The reported case laws in

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- A Malaysia would reveal that there were only a handful of cases where a contractor had actually applied for the preservation of the retention monies during the pendency of the contract, and was done so after the defendant had gone into liquidation. There could be many reasons why the fund was not set aside; the obvious ones being that the contractor would not want to jeopardise
- B the commercial relationship of the parties when the contract was still subsisting; the contractors would not really apply their minds to taking such action to preserve the retention funds especially when the employer was paying monies under the payment certificates; and so on.
- C [29] The *Rayack Construction* case also failed to consider the fact that a trust, once created, would survive the company's liquidation. This is obvious — the monies held in trust were not its monies in the first place, and the status of the trust does not change by virtue of the company's liquidation. Once it is found
- D that the retention monies are trust monies, the question of preferential treatment to the respondents does not arise as the monies do not belong to the liquidation fund in the first place.
- E [30] Therefore with respect, the court agrees with the submission of the respondents' counsel that the decision in *Rayack Construction* case should not be preferred in the present appeal.
- F [31] On the issue of estoppel, the appellant contended the respondents are estopped from claiming that the retention monies are trust monies when the respondents filed the proof of debt vide Form 77 dated 11 September 2009 with the liquidators of the appellant.
- G [32] The court agrees with the respondents' counsel that the argument on estoppel is an afterthought, and was only raised after the defence was filed on 16 July 2010. The appellant did not at any material time, after the filing of the proof of debt raise at the issue of estoppel in any of its letters in reply to the respondents' letters stating that the retention monies are trust monies. In any event, whether or not estoppel applies would depend on the facts and circumstances of each particular case. Different facts may lead to different
- H conclusion.
- I [33] In the present case, it is clear from the sequence of events before, at the time and after the filing of the proof of debt that the first respondent has clearly maintained its stand that the retention monies are trust monies. During cross-examination, SD1 (one of the joint liquidators) had also clearly agreed that he knew of the fact that the first respondent had not given up its claim that the retention monies are trust monies. Therefore, the appellant cannot be said to have been led to believe by the first respondent's filing of the proof of debt that the first respondent has given up its right to pursue the retention monies

as trust monies. The respondents' witness, SP1, had also testified that the filing of the proof of debt was only a precautionary measure by the respondents to safeguard their position and was done without prejudice to the respondents' right to claim for the retention monies as trust monies.

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[34] The appellant's counsel had in fact, during the stage of submission after full trial at the High Court, abandoned the argument on the issue of estoppel. This is reflected in the appellant's written submissions filed at the High Court and the audio recording of the proceedings (pp 678–682 — appeal records).

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[35] For the above reason, the court finds that the issue of estoppel raised by the appellant has no merit and must be disregarded for the purpose of the appeal.

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CONCLUSION

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[36] Based on the above considerations, the court makes the following findings:

- (a) the retention monies are by their nature and purpose, trust monies held by the appellant for the respondents for specific purpose ie for payment on the costs incurred by the appellant to rectify defective works by the respondents or to complete the works left uncompleted by the respondents;
- (b) the appellant's consulting engineer had issued a certificate of practical completion, and that no claim has been made for any rectification costs;
- (c) the fact that the retention monies were not separated from the appellant's common fund prior to its liquidation did not change the status of the retention monies as trust monies;
- (d) there is no issue of preferential treatment to the respondents if the retention monies are found to be trust monies because the monies do not belong to the appellant in the first place right from the outset when they were deducted from the progress payment due and payable to the respondents under cl 22 of the contract;
- (e) to allow the retention monies to become part of the general funds of the appellant would only result in the other creditors of the appellant being unjustly enriched;
- (f) the filing of the proof of debt in Form 77 by the respondents in the circumstances and the facts of the case herein, does not affect the respondents' right to claim for the retention monies as trust monies; and
- (g) the respondents were therefore entitled to their claim for a declaration that the retention monies totaling RM6,127,884.50 are monies held in

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A trust by the appellant for the respondents; for the release of the same by the appellant to the respondents as the beneficiaries of the retention monies.

B [37] Therefore, the court unanimously dismisses the appeal with costs of RM20,000 to the respondents. The decision of the learned High Court judge is affirmed. Deposit to the respondents on account of costs.

Appeal dismissed with costs.

C Reported by Kohila Nesan

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